

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF HAWAII  
3 CARA BARBER, et al., ) CIVIL NO. 14-00217HG-KSC  
4 Plaintiffs, )  
5 vs. ) Honolulu, Hawaii  
6 OHANA MILITARY COMMUNITIES ) June 26, 2014  
7 LLC, et al., ) 10:00 A.M.  
8 Defendants. )  
 ) Defendants Motion to Dismiss  
 ) Plaintiff's Class Action  
 ) Complaint For Damages

## 11 APPEARANCES:

12 For the Plaintiffs: Patrick Kyle Smith  
13 Jill Ward  
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## 1 APPEARANCES (Cont'd) :

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25 Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

1 THURSDAY, JUNE 26, 2014 10:00 A.M.

2 THE CLERK: Calling the case of Civil 14-00217HG-KSC,  
3 Cara Barber, et cetera, et al., versus Ohana Military  
4 Communities LLC, et al. This hearing has been called for  
5 defendants motion to dismiss plaintiff's class action complaint  
6 for damages. Appearance by counsel.

7 MR. SMITH: Good morning, Your Honor. Kyle Smith on  
8 behalf of plaintiffs, Cara Barber.

9 THE COURT: Good morning.

10 MR. REVERE: Good morning, Your Honor. Terrance  
11 Revere on behalf of the plaintiffs as well.

12 THE COURT: Good morning.

13 MR. SMITH: Your Honor, we also have several, Malia  
14 Nickison-Beazley from our office, Joe Fritoli, and Jill Ward  
15 from our office.

16 THE COURT: Good morning.

17 MR. WHATTOFF: Good morning, Your Honor. Randy  
18 Whattoff for defendants.

19 THE COURT: Good morning. It's your motion,  
20 Mr. Whattoff.

23 THE COURT: No, I don't really care, now that we have  
24 good microphones. But let me apologize for not wearing a robe,  
25 it just doesn't fit over my dislocated elbow, but soon it will.

1                   MR. WHATTOFF: Your Honor, our motion is based on  
2 three basic arguments, first we argue that plaintiffs failed to  
3 plead there was anything actually wrong with the soil around  
4 their homes. Plaintiffs' core allegation in their complaint is  
5 that the soil exceeded tier 1 levels, but there is nothing  
6 necessarily unsafe or improper about tier 1 levels.

7                   The second basis for dismissal here is that the  
8 complaint contains no allegations about the state of the  
9 neighborhoods when plaintiffs actually lived there. During the  
10 2000s, both the military and defendants engaged in extensive  
11 redevelopment in those areas, and in doing so, they made  
12 substantial efforts to resolve any issues with the soil.

13                   Third, there are a myriad of legal problems with  
14 plaintiffs individual claims. Indeed, plaintiffs even offered  
15 to voluntarily remove one of their claims in their opposition.

16                   Now, with respect to the first issue, in their  
17 opposition, plaintiffs essentially agreed that there is nothing  
18 inherently unsafe or improper about tier 1 levels. Plaintiffs  
19 recognize that these are essentially screening levels.  
20 Basically, where a landowner or developer is looking at a piece  
21 of property, they can use these tier 1 levels to quickly  
22 determine whether that property is automatically safe for all  
23 purposes or whether additional investigation needs to be done.

24                   Now, while plaintiffs seem to recognize in their  
25 opposition the tier 1 levels are -- there's nothing necessarily

1 unsafe or improper about tier 1 levels, they absolutely do not  
2 recognize that in their complaint where they allege that the  
3 soil is dangerous merely because it exceeds these tier 1  
4 levels. And this point is made, for instance, in paragraphs  
5 28, 35, 82, 111, 122, 132 of the complaint.

6 Now, despite all of this, in their opposition brief  
7 plaintiffs argued that our motion should be denied because  
8 there were tier 2 exceedances as well. Now, the most  
9 fundamental problem with this argument is that it's nowhere in  
10 the complaint. Plaintiffs opposition brief contains a lengthy  
11 discussion about what tier 2 exceedances are. They contend  
12 that defendants improperly calculated what the tier 2  
13 exceedance is, but none of that is in the complaint. And  
14 that's a fundamental problem for a number of reasons, but I can  
15 give you one example.

16 There are a number of different neighborhoods at the  
17 base, and the remediation of the soil in different  
18 neighborhoods were handled differently. For instance, where  
19 the military did redevelopment, it handled soils in one way,  
20 where Forest City did redevelopment and in the areas where it  
21 demolished and built new homes, it removed all of the soil from  
22 around the homes if there was a single tier 2 exceedance in the  
23 neighborhood.

24 So if this case is going to be a case about tier 2  
25 exceedances as opposed to tier 1 exceedances, defendants are

1 going to have a very different defense to this case. We'll  
2 come in and argue to the extent there were any tier 2  
3 exceedances in the past, they were properly handled. But if  
4 this is a case about tier 1 exceedances, then we have a very  
5 different defense to this case.

6 So our ultimate point here is that without a complaint  
7 stating what are plaintiffs actual claims in the case, what is  
8 at issue, it's impossible for defendants to properly respond to  
9 the complaint.

10 Now, the second basis for his motion is the fact that  
11 plaintiffs do not allege they actually lived in the  
12 neighborhoods when there were any of these tier 2 exceedances.  
13 This is a fundamental failure. If there were no exceedances  
14 when the plaintiffs lived there, there's no damages, there's no  
15 causation, there's no basis to hold defendants liable.

16 In their opposition, plaintiffs contend that  
17 defendants conducted extensive testing, that defendants  
18 established that MCBH soils were contaminated with pesticides  
19 not just in excess of tier 1 levels but also tier 2 levels.  
20 This generally isn't disputed, but as I stated, after these  
21 tests were conducted, extensive remediation efforts were done  
22 by both the military and defendants. I believe plaintiffs know  
23 this, which is why they have not pled there were any tier 2  
24 exceedances near their homes while they actually lived in them.

25 It is simply irrelevant for this case, whether there

1       were tier 2 exceedances at some point in the past before  
2       plaintiffs ever lived there and before defendants managed the  
3       homes. Finally, with respect to the legal issues with the  
4       individual claims, I'm not -- I didn't plan to go through all  
5       of the individual claims here. If the court has any questions,  
6       I'm happy to answer them.

7                   The one point that I wanted to make was that one  
8       problem that runs through, I think, many of the claims is a  
9       failure to plead sufficient facts that would support the  
10       claims. For instance, with respect to plaintiffs breach of  
11       contract claim, plaintiffs have not actually alleged what are  
12       the provisions of the contract the defendants allegedly  
13       breached.

14                  With respect to the claims for breach of the implied  
15       warranty of habitability, violation of the landlord-tenant  
16       code, and negligence, plaintiffs failed to explain how these  
17       statutory or common law duties were breached.

18                  With respect to the claims, the sound in fraud, these  
19       are not pled with particularity as are required. For instance,  
20       plaintiffs contend that defendants did not make sufficient  
21       disclosures about the pesticides at issue, but plaintiffs don't  
22       allege what should have been disclosed to the homeowners.

23                  Plaintiffs have another theory of fraud where they  
24       discuss statements about growing vegetables and fruits on the  
25       property. Plaintiffs don't allege when those statements were

1 made, what was the specific content of those statements, and I  
2 think the reason they don't allege that is because I think the  
3 statements they were referring to are statements that were made  
4 after plaintiffs had obtained counsel and after plaintiffs had  
5 threatened suit in this matter which would severely undermine  
6 any reliance there.

7 So without these facts, plaintiffs have failed to save  
8 any claims. In conclusion, I think that the reason the  
9 plaintiffs complaint has all of these issues is because  
10 defendants have not done anything wrong here. The pesticides  
11 at issue were the only pesticides that existed for fighting  
12 termites in the '50s, '60s, and '70s, and they were, therefore,  
13 applied universally throughout Oahu. It is common to find  
14 these pesticides around older homes throughout the island.  
15 People have lived around them for decades without problems.

16 Despite this, defendants took extensive and  
17 conservative efforts when they were redeveloping the property,  
18 steps that were reviewed and approved by the Hawaii Department  
19 of Health. For all of the foregoing reasons, we respectfully  
20 ask that you dismiss the complaint. Thank you, Your Honor.

21 THE COURT: Do you believe that there is a mediation  
22 requirement in the lease?

23 MR. WHATTOFF: Your Honor, there is a mediation  
24 provision in the complaint.

25 THE COURT: In the lease.

1                   MR. WHATTOFF: I'm sorry, in the lease, you are  
2 correct. We received a request for mediation from plaintiffs  
3 attorneys prior to the lawsuit being initiated. Defendants  
4 responded to that request. We laid out, sent them a detailed  
5 letter explaining why we didn't think there was any allegations  
6 here and saying that unless plaintiffs could explain why they  
7 had proper allegations we did not intend to mediate. And we  
8 never heard back on that letter, I don't think. Plaintiffs  
9 immediately went and filed this lawsuit.

10                  THE COURT: Okay. Thank you.

11                  MR. SMITH: Good morning, Your Honor.

12                  THE COURT: Good morning.

13                  MR. SMITH: I'm not sure if a dislocated elbow is  
14 anything like a dislocated thumb, but I did that a month or two  
15 ago and it hurt horribly.

16                  THE COURT: No. That would be a no.

17                  MR. SMITH: I can only imagine.

18                  THE COURT: And you're Mr. Smith?

19                  MR. SMITH: Yes, Your Honor.

20                  THE COURT: Okay.

21                  MR. SMITH: My name is --

22                  THE COURT: But I appreciate the connection, but, no.

23                  MR. SMITH: Well, I couldn't even brush my teeth with  
24 it, and it still hurts just to hold a pencil, yeah. I'm sure  
25 it's much, much worse. It's terrible.

1                   THE COURT: Actually, it was incredibly painful, but  
2 they said to me after you put it back, it won't be painful.  
3 And I thought, how is that possible? And it's true, it's  
4 really not painful. It's just painful when you tear all the  
5 ligaments and the tendons, and once they put it back, your arm  
6 goes, okay, I'm going to heal now.

7                   MR. SMITH: Right. Thank you very much. Exactly.

8                   THE COURT: So it's not so bad. Maybe the thumb is  
9 worse.

10                  MR. SMITH: The dislocation wasn't bad, as you  
11 mentioned, it's the tendon tears that hold it in place. And  
12 you wear the brace, but at some point you have to, like, move  
13 off the training wheels, and it's no fun. And anyway, so it's  
14 neither here nor there.

15                  THE COURT: I'll be careful not to dislocate my  
16 thumbs. I'll stay with the elbows.

17                  MR. SMITH: I wouldn't recommend that either.

18                  THE COURT: Okay.

19                  MR. SMITH: I don't think I need to belabor the point  
20 of a Rule 12(b) (6) motion, but essentially it's to make sure  
21 that a complaint has plausibility. And that's the new Iqbal  
22 and Twombly standards, essentially, that say it's not enough to  
23 just plead, just bear allegations of this is a cause of action  
24 and you breached it and there we go, but you actually have to  
25 have some facts attached to that framework in which to hang a

1 case upon.

2 And with that being said, I do want to address some of  
3 the concerns that have been raised by defendants, and also make  
4 sure it's clear that the point of a 12(b)(6) motion is not to  
5 encourage essentially intentional ignorance on the part of  
6 defendants, who essentially play a game that we're moving to  
7 dismiss because you don't know exactly how bad we were when you  
8 filed our complaint. And that's essentially what's going on  
9 here.

10 There's several balls in the air, if you will, that  
11 are brought by the motion of defendants. There is essentially  
12 the two overarching umbrella arguments, and the first one is  
13 that this tier 1, tier 2 exceedance argument. The essential  
14 position defendants have taken is that a tier 1 exceedance by  
15 itself is not enough to support causes of action under our  
16 complaint, negligence and breach of contract and these kind of  
17 things.

18 I would note the only support for that argument that's  
19 brought or provided to the court by defendants is that Tilot  
20 Oil case, and as we addressed in our opposition, Tilot Oil  
21 doesn't stand for anything of the sort. In fact, that's  
22 conceded in the reply which says, oh, well, what you argued  
23 about Tilot Oil in your opposition is essentially what we  
24 meant. What Tilot Oil basically says is that for the purpose  
25 of an injunction, the equivalent of a tier 1 exceedance was not

1 enough because mitigation steps have been brought forward. But  
2 it by no means stands for the proposition that the equivalent  
3 of a tier 1 exceedance couldn't support claims for relief under  
4 common law and contract as we brought here.

5 In fact, let me just spend a little bit more time on  
6 that point because our position is that a tier 1 exceedance by  
7 itself absolutely would support claims for relief. And what I  
8 would analogize it to would be a speed limit. Simply saying  
9 that you breached a speed limit or you went faster than the  
10 speed limit doesn't necessarily mean you're driving unsafe, but  
11 it certainly doesn't mean that you were driving safe. In fact,  
12 unless you know what those actual speeds are and how much the  
13 breach is --

14 THE COURT: I'm sorry, this doesn't work for me.

15 MR. SMITH: Okay.

16 THE COURT: Too much criminal law background to work  
17 with that one.

18 MR. SMITH: Fair enough.

19 THE COURT: I think you need to concentrate on  
20 why -- are you taking the position that you haven't alleged  
21 tier 2 violations?

22 MR. SMITH: We absolutely do allege tier 2 violations.  
23 My point, Your Honor, though is that a tier 1 violation, a 2  
24 would support these causes of action, what a tier 1 exceedance  
25 shows is that there are levels of contamination of concern.

1 And then you have to go out and figure out what are those  
2 levels of contamination. In this case, and it's alleged in the  
3 complaint, there was testing actually done by Forest City. In  
4 fact, we talked about it, it's talked about in the pesticide  
5 soil management plan. They did over a thousand soil tests in  
6 the two neighborhoods, and those tests absolutely confirmed  
7 that levels were far in excess of tier 1 and tier 2 levels.

8 And if you actually look at our complaint, this is  
9 paragraph 28, which says, "before taking over MCBH residential  
10 housing, defendants were aware that chlorine levels were many  
11 times higher than the EPA's tier 1 environmental action  
12 levels."

13 It's also mentioned in paragraph 33 which says, "Upon  
14 information and belief, Your Honor, in addition to heptachlor  
15 chlordane, heptachlor epoxide levels in excess of tier 1 and  
16 tier 2 levels, defendants were also aware of chemical  
17 contamination for Aldrin, Dieldrin, and Endrin in excess of  
18 these recommended limits."

19 THE COURT: Okay. I'm trying to figure out, you know,  
20 I agree that this is a question of motion to dismiss, it's not  
21 a question of summary judgment. We're talking about whether  
22 you have alleged sufficiently. But I'm having some trouble  
23 figuring out what it is that the damages that you're alleging.

24 The position of the defendant seems to be, yeah, we  
25 did all this testing and then we fixed it. And I'm trying to

1 figure out if you are saying they didn't fix it and we have  
2 damages from that or they didn't tell us they fixed it. I  
3 mean, you're going to have to amend. And I'm just trying to  
4 figure out what it is that you are trying to say.

5 MR. SMITH: Let me address that point specifically,  
6 Your Honor. So in 2006 when Ohana and Forest City Residential  
7 Management, essentially these are both Forest City entities --

8 THE COURT: And you need to deal with how you're tying  
9 in the -- the agent, because they're not a signature on the  
10 contract.

11 MR. SMITH: Sure.

12 THE COURT: And I'm not seeing in your complaint how  
13 you were tying those in --

14 MR. SMITH: I understand.

15 THE COURT: -- and giving them responsibility. You  
16 haven't pled that sufficiently so, you know, they aren't on the  
17 hook on a number of your causes of action.

18 MR. SMITH: Let me take the first point and then we'll  
19 talk about the agent. So the first point is that in 2006 the  
20 levels and the warning was made to Ohana, essentially to the  
21 Forest City, it's really the same entity, but the levels were  
22 known. Testing was done. So they originally know it's over  
23 these tier 1 exceedances. They go out and do the testing to  
24 confirm, and they have many, many tests far in excess of the  
25 tier 1 and tier 2s in the neighborhoods.

1                   And they -- in fact, they decide the levels are so  
2 severe, they don't do any more testing through the rest of the  
3 base because they say what's the point, we're going to assume  
4 it's all contaminated based on the level of these results,  
5 okay.

6                   So the two -- the two issues of what the damages are,  
7 what defendants have alleged in their motion and also in their  
8 reply is that well, we came in and fixed it. We directly  
9 dispute that, and that's disputed in the complaint. In  
10 paragraph 41 we say there was a plan put in place. The plan  
11 said there was supposed to be notice. The plan was there's  
12 supposed to be no dust. The plan says that if there is in  
13 excess of the tier 2, we're going to go fix it.

14                  And so what they did over this period of time from  
15 2006 to the present is people -- they don't tell any of the  
16 military families, they allow them to move in. And so families  
17 are living on the base on soils that are contaminated. That's  
18 why it's alleged in our brief that there is contamination,  
19 there's intentional exposure. And then they went about doing  
20 this phased repair through the base kicking up all kinds of  
21 dust and this kind of thing.

22                  THE COURT: Are you saying that the places where  
23 people moved in had this problem or places around them had this  
24 problem?

25                  MR. SMITH: Both.

1                   THE COURT: Because I'm not getting that out of your  
2 complaint. It's not sufficiently clear.

3                   MR. SMITH: Well, Your Honor, we allege that this plan  
4 to fix the base housing of chemical and pesticide contamination  
5 was not implemented. There's then been an allegation that it  
6 was implemented, in fact, one of the reasons why we demanded  
7 mediation was because our families wanted to know what have you  
8 done at my home, okay.

9                   And so to some extent, exactly what they did at a  
10 certain address is still unknown, and that was refused to be  
11 provided by Forest City. So the way the complaint is alleged  
12 is there's chemical contamination that's known, it's confirmed.  
13 They allow families to lease in the base, and then as they  
14 repair a home, they maybe move this family out and are  
15 repairing this neighborhood, families are living right  
16 alongside that reconstruction project. And so the dust and  
17 these things are blowing from the reconstruction project.

18                   But also for the families that are still living  
19 on-site, there's been no mitigation. There is  
20 pesticide-contaminated soils, and the only disclosure that  
21 those families received is, hey, chlordane was used in the  
22 United States, even though the entire time their landlord knows  
23 that the levels are far in excess of tier 1 and tier 2 levels,  
24 hundreds, in some cases, thousands of percent higher.

25                   So it's both. Families are living on base soils that

1 are contaminated during this period of time, and they're also  
2 being exposed to the reconstruction fugitive dust and these  
3 things coming from this effort. Meanwhile, their landlord is  
4 not telling them anything. They're not saying, hey, this dust  
5 that's blowing in from construction that's right next door,  
6 literally 10 yards away from some of the homes, might be  
7 contaminated with pesticides. And they're certainly not  
8 telling you when a family moves into the base, hey, when your  
9 kids or pets are playing in the yard, these soils are  
10 contaminated with pesticides, and that's clear. We cite that  
11 in the complaint. That's the chlordane disclosure.

12 It's part of the Forest City or the Marine Corps  
13 residential -- I forget the precise, but the handbook, that's  
14 actually provided to you and you sign off on it when you get  
15 the lease. It's essentially incorporated in the lease. And so  
16 this argument that we don't know when this disclosure is made  
17 or this improper fraudulent omission, it's made right when that  
18 lease is done. You sign the lease. You get the handbook. It  
19 says nothing that you're moving into a property that has  
20 pesticide contaminated soils.

21 THE COURT: What I am concerned with at this point --

22 MR. SMITH: Yes, Your Honor.

23 THE COURT: -- is a sufficient articulation of your  
24 claims as opposed to a more general articulation. For  
25 example --

1 MR. SMITH: Yes, Your Honor.

2 THE COURT: -- saying that at some point dust, at some  
3 point dust was released, it doesn't help with a -- there's no  
4 particularity. There's no location. There's no time. There's  
5 no way of saying who and what were damaged at that point in  
6 time. Was it last week? Was it, you know, two years ago? Who  
7 was living there at that point?

8 I mean, you don't have sufficient particularity at  
9 this point with respect to that. But go ahead with the rest of  
10 your argument.

11 MR. SMITH: Well, and I understand -- I understand  
12 Your Honor's concern on the dust. The dust presumably would  
13 have been as construction proceeds through the development.

14 THE COURT: You've got to put it in your complaint.  
15 It's not enough to tell me now.

16 MR. SMITH: I recognize that. I recognize that, Your  
17 Honor. But my point is that as far as this failure to  
18 disclose, this failure to warn, that certainly spans the  
19 entire --

20 THE COURT: I'm not too worried. I mean, I believe  
21 you probably properly pled one part of your cause of action in  
22 that when the disclosure just says the United States and you're  
23 alleging that these other things are happening, but that's just  
24 a very small part of your complaint, you know. You've got like  
25 10 or 13 causes of action, and that's just one of them. When

1 you're getting into fraud and when you're getting into what  
2 kind of injury there is, that's a whole nother problem.

3 And there's a whole bunch of law out there that I  
4 don't think has been taken into account in terms of how you're  
5 pleading the issue of medical monitoring. I mean, there's a  
6 lot of law in the Ninth Circuit and nationally, and it's pretty  
7 much, you know, across the board there's a spectrum of where  
8 people are in this.

9 MR. SMITH: That's right.

10 THE COURT: And I think you have to look at that a  
11 little more carefully in terms of how you want to plead that.

12 MR. SMITH: Well, I recognize as far as that remedy,  
13 to some extent until it's confirmed what the different levels,  
14 pardon me, as the phasing of the construction went through, so  
15 what community, part of the community is living on the impacted  
16 soils. And then as they -- presumably, it's been represented  
17 at least, as they fix homes, they then move family members into  
18 the fixed areas. So that issue of the medical monitoring, I  
19 definitely take Your Honor's point.

20 With respect to the second broad umbrella argument  
21 that they make is this argument that people weren't living on  
22 the base during this time. We absolutely allege that they  
23 were. And our class representatives who were proposed lived  
24 there through the entire 2006 timeframe to the present on  
25 behalf of the class. There were absolutely families living on

1       actually contaminated home sites during this process, during  
2       this period.

3               Likewise, there's families who are living on  
4       ostensibly reconstructed homes where they claim they moved the  
5       soil, but are still living next to the construction phasing of  
6       this repair of contaminated soils.

7               THE COURT: It's not clear from your complaint.

8               MR. SMITH: Okay. I understand, Your Honor.

9               THE COURT: Go ahead.

10               MR. SMITH: Your Honor, I'm prepared to go through  
11       each of the different causes of action as well, although I  
12       don't want to, you know, I'd really rather be focused in to  
13       address Your Honor's actual concerns.

14               THE COURT: Oh, no, go ahead. Go ahead and make your  
15       argument.

16               MR. SMITH: Fair enough, Your Honor. With respect to  
17       breach of contract, in the very beginning, in the motion it  
18       claims that, well, what contract are you talking about, what  
19       provisions are you talking about. We cited the lease, and we  
20       cited specific lease provisions in the complaint. I could  
21       point Your Honor to those.

22               THE COURT: No, I saw that.

23               MR. SMITH: Yes. I'll move on from that. I do take  
24       Your Honor's point that Forest City Residential Management is  
25       the agent and, therefore, probably not the proper party, at

1 least on the evidence that we have in front of us, to argue  
2 that they are a party to the breach of contract.

3 And that would carry down, these other claims that are  
4 part of this contract, for example, the breach of warranty of  
5 habitability essentially becomes a clause in a contract is one  
6 way to think about it. I know it gets pled differently, but  
7 that is the clause of the contract. There's a warranty of  
8 inhabitability. We do withdraw our tortious breach of  
9 contract. The breach of the landlord-tenant code --

10 THE COURT: That's good, because that was the case I  
11 sent over to certify to the Hawaii Supreme Court. So, good  
12 idea.

13 MR. SMITH: Good idea. I recognize that. It's always  
14 funny on that because that claim still gets pled in state court  
15 all the time and litigated all the way to the end, right.

16 It's fine. It's quite clear that we're happy to --

17 THE COURT: Those parties tried to settle and the  
18 Supreme Court wouldn't let them, they wanted to settle the  
19 issue, so they ruled anyway.

20 MR. SMITH: Your Honor, with respect to the breach of  
21 landlord-tenant code, again, it was pled as a separate claim,  
22 but, essentially, it's a part of the contract. And so to the  
23 extent that's not clear, it's incorporated specifically within  
24 the lease agreement between the parties that the provisions of  
25 the landlord-tenant code would apply.

1                   So to the extent Your Honor felt like dismissing that  
2    as a separate claim, it's sort of neither here nor there  
3    because it's part of that contract. It's also relevant, I  
4    would argue, to negligence as a standard that breach of sort of  
5    a recognized sort of statutory code of conduct can be evidence  
6    of negligence as well.

7                   The unfair and deceptive trade practice, this is a key  
8    issue, and it ties in with the fraud claims. It's all sort of  
9    the same course of conduct. The essential arguments that's  
10   been brought by defendants is that we don't plead it with  
11   particularity, the who, what, when, and where. These claims  
12   really focus, not on the dust, and, again, Your Honor's points  
13   on the dust are well taken, but specifically upon the  
14   disclosure and the failure to disclose. And so if you look at  
15   the U.S. Steel case, it's not fraudulent intent, it's  
16   essentially a tendency to mislead. And that's the standard.

17                  And so as far as the who, we're clear on the  
18    complaint, it's paragraph 80, it's the class plaintiffs. As  
19    far as the what and where, again, it's clear in the complaint,  
20    it's section 82. It's to entice or entice military families to  
21    enter leases with defendants at Marine Corps Base Hawaii. They  
22    did not disclose pesticide contaminated soils.

23                  As far as the when, it's paragraph 83, it says, "after  
24    entering leases with class plaintiffs, defendants asserted it  
25    is safe for families to work and play in their yards." Again,

1       that's specifically taken from that disclosure that talks about  
2       the U.S., chlordane in the U.S., and this kind of thing, that  
3       specific language. Yes.

4               THE COURT: But where are your damages?

5               MR. SMITH: The damages are that if I'm a military  
6       tenant and I want to go get an apartment with my family or,  
7       pardon me, a house with my family, I get a basic housing  
8       allowance that I can spend on the open market. I can go to  
9       Kailua, Kaneohe, wherever.

10              THE COURT: Are you saying that it's just the rent  
11       that got paid? That's what I'm trying to determine right now  
12       is are you attempting to look at this like an asbestos case, or  
13       you've mentioned the HIV case, et cetera, you know, the damage  
14       in terms of the carcinogens, that's a lot harder to prove. And  
15       we don't really have, in this complaint, a sufficiently  
16       articulated cause of action that relates to those kinds of  
17       damages.

18              If you're just talking about they wished they'd spent  
19       their money some place where they weren't worried, yeah, you've  
20       articulated that, but I'm trying to figure out --

21              MR. SMITH: Yes, Your Honor.

22              THE COURT: -- what you're articulating with respect  
23       to the damages that flow from carcinogens in the soil. That's  
24       where I don't see --

25              MR. SMITH: Sure.

1                   THE COURT: -- a connection.

2                   MR. SMITH: Let me be crystal clear on that. This  
3                   complaint does not seek personal injury on behalf of individual  
4                   military families, children, spouses, et cetera. We're not  
5                   trying to prove that pesticide contamination at a certain house  
6                   caused cancer in little Johnny, okay? This complaint seeks for  
7                   damages. It is the rent that these -- this community paid to  
8                   this company that didn't disclose to all of these thousands of  
9                   military families, and that's the primary monetary damages.

10                  THE COURT: But why -- you still come over to the same  
11                  other question, what is their damage? You have to deal with  
12                  what being in that location, what caused them, is it just  
13                  intentional infliction or negligent infliction of mental?

14                  MR. SMITH: Well, with respect to contract, it's they  
15                  didn't get what they paid for. It's no different than if I  
16                  want to buy a car.

17                  THE COURT: So that's the habitability aspect.

18                  MR. SMITH: Yes, the habitability.

19                  THE COURT: And that's where you're going to have to  
20                  prove the inhabitability in order to collect on the rent.

21                  MR. SMITH: Sure. With respect to the specific point  
22                  of inhabitability, even if you look at the unfair and deceptive  
23                  trade practices, it's not that you have to prove that harm in  
24                  order for there to be a remedy and for there to be damages,  
25                  it's that it was deceptive. That's the key. And the measure

1 of those damages under either the contract or also the UDAP  
2 claims would be that rent amount. Under theories of contract,  
3 it would be something like disgorgement, for sure. The  
4 deceptive trade practices essentially looks at what you paid  
5 for that product as a consumer.

6 *Here, this family, this community of military*  
7 consumers are essentially buying housing that they're told is  
8 safe, and they didn't get it. Now, Your Honor's point is taken  
9 on the emotional distress claims bleeds over into a more  
10 individualized inquiry. You know, we concede that, and I can  
11 certainly make the argument for it as far as that that claim  
12 should still stay part of this complaint, particularly if it  
13 doesn't go forward as a class potentially.

14 But as far as a class-wide relief, I think that rent  
15 payment for this product under these different theories of  
16 contract and unfair and deceptive trade practices, absolutely  
17 we can prove up damages on a class-wide basis.

18 In fact, it's much easier than other cases I've worked  
19 on where you're looking at a community impact and you have  
20 thousands of individual renters, purchasers, sellers, for  
21 example, in a residential housing market. Here, we have a  
22 single renting company that knows exactly who was there, it  
23 knows exactly what was paid, and knows exactly how it organized  
24 its community. So in many ways, it's much simpler.

25 THE COURT: You still have to prove that there was

1 something wrong.

2 MR. SMITH: True, Your Honor. Well, and typically the  
3 way you would prove there's something wrong would be, I don't  
4 know, maybe something like testing within that community,  
5 which, again, has been done by defendants that confirmed these  
6 levels were far in excess of not just a screening level, not  
7 just their own level --

8 THE COURT: But it's my -- and we're not trying the  
9 case right now.

10 MR. SMITH: Yes.

11 THE COURT: But I understand their position is, but we  
12 fixed it. And if they did fix it, where are you?

13 MR. SMITH: Well, if I'm -- and, in fact, our clients  
14 are these people who lived there from 2006 until they fixed it,  
15 they still were exposed for those years.

16 THE COURT: Okay. So then we're talking about how it  
17 was fixed.

18 MR. SMITH: Yeah.

19 THE COURT: And the impact of them during this period.

20 MR. SMITH: Yes.

21 THE COURT: And that's not really clear in your  
22 complaint.

23 MR. SMITH: Well, we don't know that, the factual  
24 assertion made in the motion is that they fixed it. That's  
25 made in the reply and a number of places. That's frankly

1 beyond the 12(b)(6). The argument is that they fixed it --

2 THE COURT: I know. I'm just pointing out that, I'm  
3 hearing a slightly different argument than, because your  
4 complaint isn't clear, and I'm hearing a slightly different  
5 argument today, which is fine because that's the point --

6 MR. SMITH: The purpose.

7 THE COURT: -- of having a motion to dismiss. And if  
8 you're in the Ninth Circuit, you always get another bite at the  
9 apple.

10 MR. SMITH: Right.

11 THE COURT: But I'm trying to help us not have a  
12 couple of amendments and deal with --

13 MR. SMITH: No, I appreciate that.

14 THE COURT: -- what it is that you actually believe  
15 your damage is. And what I'm hearing now is even if they fixed  
16 it, they fixed it over time and our people were exposed to bad  
17 stuff. And if that's part of your complaint, you have to  
18 articulate that because if that's -- if that's all you end up  
19 with that they actually did fix it but it didn't get fixed  
20 until 2009, then you have to articulate, you know, the damages  
21 that you're talking about or the damages of living in a place  
22 where it wasn't fixed during that period and then you have to  
23 deal with what is the damage, you know.

24 And that goes, relates back to what was there and  
25 what -- what the effect on the people is that was there. And

1       then we get into this other thing with the medical monitoring,  
2       et cetera, which is a whole nother can of worms.

3                    MR. SMITH: Your Honor, when you draft a complaint and  
4       then it gets looked at --

5                    THE COURT: You don't -- I mean, this is part of the  
6       process. You know, I'm working on a way higher level than I am  
7       about 20 percent of the time, 30 percent of the time. I'm not  
8       complaining about the complaint, nor am I complaining about the  
9       motion to dismiss, I'm just trying to get us to a place faster.

10                  MR. SMITH: Right. And the point I was going to make  
11       is, Your Honor, when the complaint is drafted, we allege that  
12       it's not been fixed. That's why -- one of the reasons we asked  
13       for the mediation. They've now come back and made assertions  
14       that, oh, through this 2006, 2005 to 2014 period, it was  
15       repaired. And then we did it in phases.

16                  And, in fact, because of this filing of the complaint,  
17       this is just back story, I guess, they finally produced to  
18       Department of Health and others these plans that say, oh, that  
19       we did these things. So if they did that and it was done  
20       correctly, great, that may very well put a capstone on the  
21       outer edge of the case theoretically, if they did it right.

22                  And so we might be talking about a 2006 to 2014, let's  
23       say, period, everything's fixed at this point, and they've  
24       essentially cut off their liability going forward. If that's  
25       not the case though, and this is really part of what a case

1 like this is designed to also flesh out is what did they  
2 actually do. That wasn't known that they'd done any of this  
3 when this complaint was filed. And it's only through the  
4 motion that this has now been asserted.

5 Going back to Your Honor's actual, I think the core  
6 concern, which is let's make sure the complaint looks the way  
7 it should as we go forward in the case and we're all on the  
8 same page. The core allegation of this complaint is there's  
9 this period from 2006 to at least 2014 where families are  
10 living on that base and they're on top of contaminated soil.  
11 And if the assertion is that it's all been fixed, well, let's  
12 get into that and figure out at what point the outer bound is.

13 But there's definitely a group of people who were  
14 living on there during that period of time who were not treated  
15 properly.

16 THE COURT: What about the mediation issue? Because  
17 I'm wondering why we're here if you were supposed to mediate  
18 these things.

19 MR. SMITH: The mediation clause that you probably  
20 looked at in the lease, what it basically says is that if you  
21 don't mediate, if a mediation demand is made and the other  
22 party fails to mediate, then they don't have a claim for  
23 attorneys fees and costs. And so in the sense that it's a  
24 mandatory absolute mediation clause, you have to go through  
25 that in order to come litigate, it doesn't read that way.

1                   We made the mediation demand. They came back and said  
2 everything's fine. We did respond. There was a response that  
3 said we don't see anything -- reason to mediate. And so we did  
4 file our complaint. So we went through that process.

5                   THE COURT: Well, that's not exactly what Mr. Whattoff  
6 is saying. He's saying they told you what you needed to tell  
7 them you were complaining about and you didn't do that.

8                   MR. SMITH: Yeah, we told them that we want to know if  
9 the places where our clients are living and where this  
10 community is living is safe, and they refused to tell us, so we  
11 have nothing to mediate about. Everything is fine.

12                  We have clients who actually went to Forest City  
13 Residential Management to ask for the plans that are supposed  
14 to be kept underneath the pesticide soil management plan, not  
15 available. Didn't have them. So yeah, we went down that  
16 route. It was a dry well, and so we brought our complaint.

17                  And now Forest City sees that, oh, there's a complaint  
18 out there, the mediation clause from that lease is definitely  
19 not mandatory in that sense, essentially what it's done.

20                  THE COURT: But it may be an issue later on in terms  
21 of the attorneys fees.

22                  MR. SMITH: True. It absolutely is.

23                  THE COURT: Yeah. And so I am wondering if it would  
24 be helpful to have a mediation at this point, or perhaps have  
25 you redo your complaint and then have a mediation --

1 MR. SMITH: Your Honor, we'd have --

2 THE COURT: -- which would put to rest a question of  
3 whether or not attorneys fees, if there is a recovery.

4 MR. SMITH: Your Honor, I feel like we've, you  
5 know -- we've gone down that road. We've brought the  
6 complaint.

7 THE COURT: Let me tell you, at this point in time,  
8 I'm hearing two versions of the mediation. And so what I know  
9 is I have a -- at the end of this case if, you know, somebody  
10 is asking for attorneys fees, I'm going to have to resolve the  
11 question of mediation.

12 MR. SMITH: True.

13 THE COURT: And you two are not on the same page with  
14 that, which could cost somebody money later on, one, just in  
15 the terms of litigating it, and if you don't collect it.

16 MR. SMITH: Right.

17 THE COURT: So I think that is something you folks  
18 should consider, but it would probably be a good idea to at  
19 this point, unless you don't want it, you'd rather just go to  
20 mediation, do an amendment.

21 MR. SMITH: Your Honor, on the mediation, a demand was  
22 made, the complaint was brought. In the settlement conference  
23 we've certainly discussed the idea of having some kind of  
24 mediation or discussions going forward to try to resolve  
25 different aspects, that was in front of Judge Chang when that

1       first came up. So there's certainly no opposition, we're  
2       always open, and, in fact, have been the party pushing that  
3       piece of it.

4               I guess what I'm very frightened of is that it would  
5       be used as a way to delay the case moving forward to where  
6       essentially -- we are certainly discussing and want to move  
7       forward with efforts to resolve aspects of the case, if we can.

8               THE COURT: Well, it probably is better for you to  
9       amend your complaint, but I think you both should consider, you  
10       know, putting to rest the question of mediation at this point  
11       in time, so it isn't something that a lot of attorneys fees go  
12       into later with a result that one or the other doesn't like.

13               So is there anything else you want to say?

14               MR. SMITH: Your Honor, if you have questions about  
15       the pleading of fraud or the other claims, I can certainly  
16       address those, but otherwise we're prepared to stand on our  
17       brief. I certainly appreciate the time you've already given  
18       us.

19               THE COURT: No, that's fine. I think Mr. Whattoff  
20       probably has something else to say, or not.

21               MR. WHATTOFF: I'll be quick, Your Honor. There's  
22       just three points I wanted to make. One is that this idea that  
23       we've sort of been hiding the ball. In connection with our  
24       initial disclosures, defendants produced about 10,000 pages  
25       that I think comprise basically all of the testing for all of

1 the neighborhoods that we have.

2 So all of the -- every time a neighborhood was  
3 developed and sort of turned over from the military to  
4 defendants, there was this comprehensive process it went  
5 through. And we've turned over, I think, all of that to  
6 plaintiffs. And I guess it's possible that there could be one  
7 or two things missing from there given that it's a lot of  
8 documents, but we've really tried to open up everything and lay  
9 it out there.

10 The second point I want to address is Mr. Smith's  
11 point that, well, with the -- with the remediation, maybe we  
12 did it right, maybe we did it wrong. They don't really know.  
13 It seems to me that what plaintiffs are describing is basically  
14 a fishing expedition in sort of the cliche that you always hear  
15 about in litigation, but they don't know if there's any  
16 wrongdoing here. They have the documents. They can look at  
17 those documents. So I do think that there is a duty on them to  
18 amend their complaint to address those issues.

19 The third issue with the mediation, I'll respectfully  
20 disagree with the characterization by plaintiffs. You're  
21 right, we don't see eye to eye on that. I think that Judge  
22 Chang recommended mediation or a settlement conference in front  
23 of Judge Chang. I have proposed to Mr. Smith that we do go in  
24 front of Judge Chang, and I've suggested some sort of framework  
25 for what that would look like. We're certainly willing to

1 consider that, Your Honor.

2 THE COURT: Okay. You know, we do have people who are  
3 willing to take on mediation, you know, other than Judge Chang,  
4 so it's something more in depth. Or maybe you two would  
5 like -- the two sides would like to look at who would do that,  
6 but it seems to me that it's in everybody's best interest when  
7 you have this in the lease and it affects attorneys fees to not  
8 be where you are right now where you're each pointing the  
9 finger, you know, I want to do it, I did this, you did that.

10 I mean, what I see in these kinds of cases is, you  
11 know, you spend, you know, huge amount of money litigating  
12 whether or not you -- who is at fault in not mediating. So why  
13 not mediate and let that, put that to rest? Because at the end  
14 of the case, it's -- it's very expensive and it can have a, you  
15 know, good money after bad and no return.

16 So I think that, and whether mediation is not  
17 necessarily going to be something that Judge Chang can do  
18 unless you structure it in a way because, you know, mediation  
19 usually involves somebody who is really going to get into the  
20 nitty-gritty with you. And so that is something that we can  
21 come up with or you folks can come up with on your own in terms  
22 of setting that up, Judge Chang, you know, would be helpful  
23 with that.

24 MR. WHATTOFF: The only -- I think that we're willing  
25 to explore either option. I do think Judge Chang seemed to be

1 willing to kind of dig into this when we talked to him, but  
2 we're certainly willing to discuss that with plaintiffs.

3 THE COURT: Then you would need to decide  
4 whether -- and what I'm trying to avoid is you would need to  
5 decide whether that meets mediation.

6 MR. SMITH: Sure.

7 THE COURT: Because what I don't want is this  
8 unanswered question. Because right now I have a contract that  
9 says you're supposed to mediate and you're blaming each other  
10 for not mediating, and, so, I don't want to be dealing with it  
11 at the end -- this at the end of the case.

12 So if you are willing to look at and agree, you know,  
13 on the record that Judge Chang is being a mediator, that may  
14 not really be sufficient for the depth that you're talking  
15 about so, you know, I think you have to address this problem  
16 now as opposed to later. I think it will -- I don't think this  
17 case is going away immediately, and it would make a lot of  
18 sense to lay that to rest.

19 MR. SMITH: Your Honor, although we're concerned about  
20 the mediation sort of delaying the progress of the case, we're  
21 definitely not opposed, in fact, I would even just make a  
22 request on the record to be ordered to mediation. I agree, I  
23 think that, frankly, a mediation in front of Judge Chang would  
24 not be as effective as someone that can get down into the  
25 depth. And the mediation that's been sort of proposed, without

1 getting into details, in front of Judge Chang is really trying  
2 to say we're only willing to mediate on pieces of it, and I  
3 find that's not particularly effective.

4 THE COURT: I don't think really Judge Chang, unless  
5 you're both willing to agree that that's mediation, magistrate  
6 judges don't have the time --

7 MR. SMITH: I agree.

8 THE COURT: -- that a mediator would in a particular  
9 case, and so I'm -- unless, if you're not agreeing that that is  
10 actual mediation then that isn't going to be, that isn't going  
11 to solve the problem.

12 MR. SMITH: Thank you, Your Honor.

13 MR. WHATTOFF: Your Honor, one request I would  
14 make -- oh, sorry.

15 MR. SMITH: I was just going to say, I would make a  
16 request on the record for you to order us to mediation.

17 THE COURT: Okay. And Mr. Whattoff.

18 MR. WHATTOFF: I was just going to suggest that to the  
19 extent there is going to be mediation, you'd mentioned whether  
20 the amended complaint should come first or whether mediation  
21 should come first, I would request that the amended complaint  
22 come first so we know exactly what are the damages and the  
23 claims that we're mediating.

24 THE COURT: Well, you're never going to know exactly  
25 what the damages are, because that's a little bit, you know, we

1       wouldn't bother having trials if we actually knew that. Okay,  
2       I am going to issue a short order, but I think we've gone over,  
3       you know, some of the things that need to be done and you'll  
4       have 30 days from the time the order issues to do your amended  
5       complaint.

6               And I will talk with Judge Chang and -- about this in  
7       terms of mediation, and I think it would be something that is  
8       in both your best interests. And the magistrate judge can  
9       order it just as well as I can, and I think it will be better  
10      if he fashions something that met all of the requirements  
11      rather than me doing it in just a very broad generalized, but I  
12      am saying it's something you really need to do not to have at  
13      the end a problem.

14               Is there anything else to come before the court?  
15      Thank you.

16               (The proceedings concluded at 10:47 a.m., June 26, 2014.)

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3 I, CYNTHIA R. OTT, Official Court Reporter, United  
4 States District Court, District of Hawaii, Honolulu, Hawaii, do  
5 hereby certify that pursuant to 28 U.S.C. §753 the foregoing is  
6 a true, complete and correct transcript of the stenographically  
7 reported proceedings had in connection with the above-entitled  
8 matter and that the transcript page format is in conformance  
9 with the regulations of the Judicial Conference of the United  
10 States.

11

DATED at Honolulu, Hawaii, July 8, 2014.

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/s/ CYNTHIA R. OTT  
CYNTHIA R. OTT, RMR, CRR